

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERESA LA PORTE)	
Claimant)	
VS.)	
)	
N. CENTRAL KS. SPECIAL EDUC. COOP)	Docket No. 1,054,714
Respondent)	
AND)	
)	
KS. ASSOC. OF SCHOOL BOARDS WCF)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant requests review of the October 18, 2011¹, preliminary hearing Order entered by Special Administrative Law Judge (SALJ) C. Stanley Nelson. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the SALJ and consists of the preliminary hearing transcript with exhibits dated October 18, 2011, and all pleadings contained in the administrative file.

ISSUES

Claimant requests that the Board reverse the preliminary hearing Order of the SALJ which denied claimant's requests for additional authorized medical treatment and a change of authorized physicians.² Specifically, claimant contends that the services of authorized physicians, Drs. Leonard Fleske and Paul Stein, were unsatisfactory, entitling claimant to an order changing authorized physicians. Claimant also asserts that, although claimant picked Dr. Stein from a list of three physicians provided by respondent, claimant is now

¹ October 18, 2011, was the date of the preliminary hearing. The SALJ's order was not dated. It appears from the record that the Order was faxed on December 8, 2011. The application for review was filed on December 14, 2011.

² At the preliminary hearing, claimant also raised the issue of whether the SALJ should appoint a neutral physician. However, that issue was not included in claimant's application for Board review, nor was the issue argued in claimant's brief to the Board.

entitled to medical treatment with one or both of the other physicians on respondent's list of three. Finally, claimant argues that her appointment to see Dr. Stein was only for the purpose of an IME, not for the provision of medical treatment.

Respondent argues that the Board does not have jurisdiction to review the SALJ's preliminary hearing Order. In the alternative, respondent contends the SALJ's Order should be affirmed on the merits.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On April 22, 2010, claimant sustained personal injury by accident arising out of and in the course of her employment with respondent. Respondent provided authorized medical treatment with Dr. Fleske, an orthopedic surgeon. Dr. Fleske released claimant at maximum medical improvement on January 25, 2011. Claimant was examined at the request of her counsel by Dr. Pedro Murati on April 5, 2011. Dr. Murati recommended additional medical treatment.

In order to avoid a preliminary hearing on the issue of medical treatment, the parties agreed in April 2011 that respondent would provide claimant with a list of three physicians from which claimant would choose one as the authorized treating physician. The list consisted of Drs. Stein, Barrett and Estivo. Claimant chose Dr. Paul Stein, a neurosurgeon. In compliance with the agreement of the parties, respondent scheduled an appointment for claimant to see Dr. Stein on July 25, 2011. The appointment was confirmed by letter from respondent's counsel to Dr. Stein dated July 21, 2011. The letter stated in part: "We will authorize treatment if this is causally related to physical injuries [claimant] suffered while employed by U.S.D. 636."³

Dr. Stein's report is entitled "INDEPENDENT MEDICAL EXAMINATION." In his report Dr. Stein expresses his opinion that claimant needs no further medical treatment for the injuries resulting from the April 22, 2010 accident.⁴

A preliminary hearing was held before the SALJ on October 18, 2011, following which Judge Nelson entered an order denying claimant's requests for additional authorized medical treatment, change of physicians, or the appointment of a neutral physician.

³ Resp. Ex. 1 to respondent's brief to the SALJ. The SALJ provided claimant with the opportunity to comment on the SALJ's consideration of this exhibit, but there is no indication in the record that any such comment or objection was made.

⁴ P.H. Trans., Resp. Ex. A at 5.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,⁵ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

By statute preliminary findings and preliminary awards shall not be binding and may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

ANALYSIS

The relief requested by claimant at the preliminary hearing consisted of medical treatment and a change of authorized physicians. No issue is raised before the Board claiming that the SALJ exceeded his jurisdiction in entering the preliminary hearing Order. Nor is any issue raised concerning the compensability of the claim. Whether an injured worker should receive additional authorized medical treatment is not one of the issues denoted as a jurisdictional issue in K.S.A. 44-534a. The Board has ruled in the past and continues to hold that issues regarding medical treatment, including change of physician

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2010 Supp. 44-555c(k).

requests, are not jurisdictional in nature and are accordingly not subject to Board review of a preliminary hearing Order.⁸

An administrative law judge has the authority to address issues of medical treatment pursuant to K.S.A. 44-534a(a)(2) which provides in part: "Upon a preliminary finding that the injury to the employee is compensable . . . the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation" Moreover, K.S.A. 2010 Supp. 44-510h grants an ALJ jurisdiction to order a change of authorized physicians when the medical services of a health care provider authorized by an employer are unsatisfactory. In determining matters of medical treatment or change of physicians in the context of a preliminary hearing, the ALJ has the authority to construe and apply the provisions of the Act necessary to determine the issues at a preliminary hearing.

A thorough review of the record in this claim reveals nothing to suggest that the SALJ exceeded his jurisdiction in entering the preliminary hearing Order. Arguments such as those made by claimant, that the SALJ misinterpreted or misapplied a section or sections of the Act, are not reviewable by the Board from a preliminary hearing Order unless the SALJ exceeded his jurisdiction.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁹ Accordingly, claimant's application for Board review is dismissed.

CONCLUSION

(1) The Board does not have jurisdiction to review the SALJ's findings that claimant should not be awarded additional medical treatment and is not entitled to an order changing authorized physicians.

(2) Claimant's request for Board review is dismissed for lack of jurisdiction.

WHEREFORE, the undersigned Board Member hereby dismisses claimant's application for Board review, which leaves in full force and effect the October 18, 2011, preliminary hearing Order entered by SALJ C. Stanley Nelson.

IT IS SO ORDERED.

⁸ See *Hubbard v. Wesley Medical Center, LLC*, No. 1,040,850, 2008 WL 5122323 (Kan. WCAB Nov. 7, 2008); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219, 395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

⁹ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

Dated this ____ day of February, 2012.

GARY R. TERRILL
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
C. Stanley Nelson, Special Administrative Law Judge